Filed 12/10/08 Zumwalt v. Kevin Lee Home Collections CA2/7

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

CARMEN ZUMWALT et al., Plaintiffs and Respondents. v. KEVIN LEE HOME COLLECTIONS, INC. et al., Defendants and Appellants.	B202712 (Los Angeles County Super. Ct. No. SC088995)

APPEAL from a judgment of the Superior Court of Los Angeles County. Richard Neidorf, Judge. Reversed in part and affirmed in part.

Paul M. Hittelman for Defendants and Appellants Kevin Lee Home Collections, Inc. and Kevin Lee.

Stephen M. Martin for Plaintiffs and Respondents Carmen Zumwalt and Devan Schulz.

Defendants Kevin Lee Home Collections, Inc. and Kevin Lee appeal judgment on plaintiffs' claims for breach of oral contract and negligence arising out of Lee's provision of wedding planning services to plaintiffs. Defendants contend that the trial court erred in awarding plaintiffs emotional distress damages on their breach of contract claim, awarding damages in excess of the prayer of the complaint, and in failing to continue the matter on the second day of trial. We reverse the award of emotional distress damages for breach of contract, and affirm the award of damages for breach of contract.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY[1]

Plaintiffs' operative first amended complaint[2] alleged that Carmen Zumwalt and her daughter Devan Schulz met with defendant Kevin Lee, the principal of Kevin Lee Home Collections (doing business as La Premier Event Productions) in July 2005 to arrange for Schulz's New Year's Eve 2005 wedding. Defendant's employee Remy Greco Brault (Brault) met with plaintiffs and made numerous representations about Lee's skill and reputation, telling them that Lee had produced weddings and events for numerous celebrities, Beverly Hills elite, and prominent cultural and political figures.

Brault introduced plaintiffs to Lee, who represented to them that he would personally be present at the wedding to ensure that all aspects of the event would go as planned. Lee told plaintiffs that La Premier would not schedule any other weddings for New Years Eve 2005, and that plaintiffs would have Lee's undivided attention and resources. Lee represented that La Premier would provide first-class catering, wait staff, menu development, valet service, flowers, lighting, tenting, entertainment, logistical supervision, and site planning. Lee told plaintiffs that La Premier would handle all equipment rentals and would

---

[1] Defendant failed to appear at the first day of a trial, and plaintiff waived a reporter's transcript. Only the second day of trial, at which defendant appeared in propria persona, was reported.

[2] The first amended complaint stated claims for alter ego, breach of oral agreement, and negligent breach of agreement.

hire and obtain a caterer, food, cocktails, wine list, valet service, bartenders, wait staff, entertainment, flowers, lighting, security, and other services. Lee told plaintiffs that the fee quoted would be more than sufficient to provide for all of the services and products and assured plaintiffs that the wedding would be a first-class dream event. Brault provided plaintiffs with a memorandum originally stating that the event would have "elegance with a chic Hollywood vibe" and would cost $64,500. Brault told plaintiffs that Lee would secure a "premier" caterer from Lawry's Restaurant in Beverly Hills, that the caterer would cook the main courses on site, and would be available on a daily basis from November 2005 to consult with plaintiffs. Eventually, the cost of the event increased to $97,000.

Plaintiffs alleged that defendant breached the oral agreement by failing to perform the services promised, including failing to provide adequate bartenders, wait and service staff, providing poor quality food and beverage, failing to provide a chocolate fountain, failing to monitor the condition of the restrooms, failing to provide staff to collect and secure wedding presents, and failing to provide appropriate supervision of the event and subsequent clean-up. Furthermore, plaintiffs alleged that Lee failed to attend the event, and failed to make himself available during its planning in a meaningful fashion, and did not have qualified and competent personnel at the reception to supervise and coordinate. Plaintiffs allege defendant overcharged for the staff, valet services, lightning, did not provide Veuve Cliquot champagne as promised, failed to secure the chef from Lawry's, and allowed the food to be served cold and in a haphazard fashion. "Defendant abdicated his responsibility to supervise the event as promised, resulting in an event that was most memorable for its exorbitant costs, substandard cuisine and inadequate service." Plaintiffs alleged damages in the amount of $40,000, and sought damages "according to proof" in the prayer.

Plaintiffs' negligence cause of action alleged that the nature of the services provided by defendants was "very personal and important to the parties. . . . Weddings are an important emotional milestone in a person's life and the memories of that event are generally meant to be treasured." Plaintiffs alleged that defendants' failure to properly plan and supervise the wedding caused plaintiffs to suffer emotional distress and humiliation.

Plaintiffs alleged damages of $40,000, and sought damages "according to proof" in the prayer.

On Monday, April 23, 2007, at the final status conference, defendant's attorney requested a continuance of the trial. The court continued the matter over plaintiffs' objection to May 9, 2007. On May 9, 2007, neither defendant nor his counsel appeared. Plaintiff waived the court reporter, called five witnesses, submitted exhibits, and rested her case. The court continued the matter to May 14, 2007.

On May 14, 2007, the court called the matter for the second day of trial. Lee appeared without counsel, and requested a continuance which the court denied. Plaintiff called Lee to testify. Lee testified he is the president and sole shareholder of Kevin Lee Home Collections, Inc.; Lee's company handles everything involved in a wedding. Sometime in February or March 2005, plaintiffs retained him to handle Schulz's wedding. He admitted that in July 2005, he told the plaintiffs he was only doing one wedding on New Year's Eve; further, he denied doing another wedding on New Year's Eve, maintaining that he only provided floral arrangements. Plaintiffs paid him the total cost of the event, $97,000, in full.

Carmen Zumwalt testified that she called defendant the day of the wedding because Lee had not arrived. Lee had told her that he was responsible for all events from beginning to end, and his assistant told her that Lee would be at the wedding.

After plaintiff rested her case, Lee testified that when he sent the Zumwalts the bill for an additional $9,500 for the subflooring required because it rained the day of the wedding, they filed this action. Prior to that time, he asserted that everyone had been happy with the wedding.

The court entered judgment on July 3, 2007, finding that Lee was the alter ego of the corporate defendant, and awarding plaintiffs $72,000 on their breach of contract claim and $30,000 on their negligence claim, for a total of $102,000. With respect to the negligence claim, the court found that the "contract was of such a nature that emotional damages would be foreseeable as a result of the negligent breach of the contract," and awarded damages for emotional distress.

DISCUSSION

I. THE TRIAL COURT ERRED IN AWARDING EMOTIONAL DISTRESS DAMAGES FOR BREACH OF THE ORAL CONTRACT.

Defendant argues that the trial court improperly awarded $30,000 in damages on plaintiffs' negligence claim, based upon emotional distress flowing from defendant's alleged breach of the oral contract. Defendant contends that plaintiffs' claim is grounded in contract, not tort, and that damages for emotional distress are not includable as consequential damages in a contract claim. (*Erlich v. Menezes* (1999) 21 Cal.4th 543, 558-559 (*Erlich*).) We agree.

In *Erlich*, the plaintiffs sought emotional distress damages based upon negligent breach of a construction contract to build the plaintiff's dream home. The house, when completed, suffered from extensive and destructive leaking. (*Id.* at pp. 548-550, 552.) In denying such damages, *Erlich* noted that the traditional measure of contract damages was the amount within the contemplation of the parties or reasonably foreseeable to them at the time of contracting. (*Id.* at p. 550.) Under principles separating theories of recovery under contract and tort, conduct amounting to a breach of contract would become tortious only if it also violated a duty independent of the contract. (*Id.* at p. 551.)

Further, damages for emotional distress are generally not recoverable in an action for breach of an ordinary commercial contract. (*Id.* at p. 558.) *Erlich* found that cases permitting recovery in such instance "typically involve[d] mental anguish stemming from more personal undertakings the traumatic results of which were unavoidable." (*Id.* at p. 559.) Therefore, where "the express object of the contract is the mental and emotional well-being of one of the contracting parties, the breach of the contract may give rise to damages for mental suffering or emotional distress." (*Ibid.*) *Erlich* noted that such cases included an agreement by two gambling clubs to exclude the husband's gambling-addict wife and not to cash her checks (*Wynn v. Monterey Club* (1980) 111 Cal.App.3d 789, 799-801); a cemetery's agreement to keep burial service private and to protect a grave from vandalism (*Ross v. Forest Lawn Memorial Park* (1984) 153 Cal.App.3d 988, 992-996); and a bailment for heirloom jewelry of great sentimental value (*Windeler v. Scheers Jewelers* (1970) 8 Cal.App.3d 844, 851-852.) Therefore, to permit recovery for emotional distress

based upon breach of contract, emotional concerns must be the essence of the contract. (*Erlich, supra,* 21 Cal.4th at p. 559; *Butler-Rupp v. Lourdeaux* (2005) 134 Cal.App.4th 1220, 1229 [recovery of emotional distress damages permitted where emotional distress is predictable result of negligence].)

In the case before it, *Erlich* found emotional distress damages not recoverable for the breach of the contract to build the plaintiffs' dream home. The negligent construction of the house did not cause physical injury; further, the building of a home was rarely a stress-free project. *Erlich* denied relief. Here, too, the breach of a contract to provide wedding planning and event production services is not the sort of contract which has at its essence "emotional concerns." Although a wedding is a life event that generally has a very strong emotional focus for the bride and groom, as well as their family and friends, it is primarily a happy event, the production of which involves a commercial contract for catering, music, and food service. Such an event is more analogous to the "dream house" in *Erlich* than to the mishandling of a loved one's funeral, the loss of heirloom jewelry, or the failure to refuse service to a gambling-addict spouse. In these cases, the contracting party's emotional well-being was the focus of the contract. Here, although the wedding itself may have emotional content, the express purpose of the contract has no emotional basis, and permitting emotional distress damages for breach of a wedding services contract would unnecessarily extend recovery for emotional distress damages to a situation beyond that contemplated by the case law. We therefore reverse the award of emotional distress damages.

II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING LEE'S MOTION FOR A CONTINUANCE, AND DID NOT EXHIBIT ANY BIAS TOWARDS LEE.

Defendants contend that the trial court abused its discretion in refusing to continue the trial to permit the unrepresented defendants to retain counsel and present their defense. They further contend the trial court committed additional misconduct by prejudging the case. We disagree.

A. Factual Background.

1. Lee's Request for a Continuance on the Second Day of Trial.

On May 9, 2007, neither Lee nor his counsel of record Michael Kushner appeared for trial. The court clerk called Kushner regarding his failure to appear. Kushner advised the court he had substituted out as defendants' counsel, and faxed a copy of the substitution of attorneys form to the court. The court found no good cause for continuing the matter, and called plaintiff's case. At the conclusion of plaintiff's case, the court issued an order to show cause re Lee's failure to appear, and continued the matter to May 14, 2007.

On May 14, 2007, Lee appeared for the second day of trial, and contended he did not know trial had been set for the prior week. The court advised Lee that Kushner had faxed the court a form showing that counsel had substituted out of the case. Lee explained that Kushner had not sent his newly-hired counsel any information about the trial, including the date, and asked for a 90-day continuance to prepare for trial. The court pointed out to Lee that Kushner had advised the court that he had prepared the file for pick up by Lee's new counsel.

The court advised Lee on the date set for trial that neither of his lawyers had shown up, nor had Lee, but plaintiffs were in court with witnesses, ready to go. "Now do I make them come back again? I don't think so. It's not their fault. . . . Quite frankly, we didn't even have to tell you that the trial had started. I had the ability . . . to actually conclude the whole case on [May 9, 2007] without you and render a verdict. . . . But out of an abundance of caution, I was expecting you to be here today with a lawyer ready to go. . . . What can I say? So who should bear the brunt of this mistake?" Plaintiffs' counsel advised the court that he had spoken to Lee's new attorney, the Law Offices of Craig L. Silver, and they claimed they had sent the substitution form to Kushner, but never got it back.

The court told Lee he would individually have an opportunity to put on a defense, but that he could not represent the corporation. Lee again asked for a continuance, but the court denied Lee's request because the trial judge was retiring on July 9, another judge would not have heard the plaintiff's case, and it would unfair to ask plaintiffs to bring all of their witnesses back. "She had people here who [were] at the wedding and they talked about the

service, or lack of service, the food, or lack of food, the waiters, or lack of waiters; all these things were discussed by them in detail. I don't feel I should ask them to come back. They did nothing wrong. [Plaintiffs' counsel] did nothing wrong. The Plaintiff did nothing wrong."

Prior to the start of Lee's defense, the court advised him, "You're trying to tell me they don't have a case against you. That may be. I haven't heard your part of the story yet. I haven't heard your case."

2. Lee's Motion for a New Trial.

On June 7, 2007, Lee substituted in his new counsel. On June 26, 2007, Lee moved for a new trial on the grounds of irregularity in the proceedings and accident or surprise based on the failure of counsel to appear and excessive damages because the complaint alleged damages of $40,000, but the court awarded in excess of $102,000. Defendant asserted that his counsel failed to keep him updated on matters, and that during the week of May 7, 2007 he was on a business trip to Europe and unaware that the trial was scheduled for that week. Lee claimed he did not learn of the trial date until plaintiffs notice of the Order to Show Cause was delivered to his business on May 9, 2007.

Brault's declaration in support of Lee's motion stated that she emailed Kushner and requested why he did not appear at the trial, reminded Kushner that he was attorney of record, and advised him that he needed to appear on May 14, 2007. Her declaration does not state whether she heard back from him. Nicole Suh, an employee of La Premier, stated in her declaration that she telephoned Kushner and told him what was going on and that he needed to appear on May 14, 2007. Her declaration does not set forth Kushner's response to this telephone call.

Plaintiffs' opposition to the new trial motion stated that Kushner did not advise the court at the April 25, 2007 status conference that Lee was traveling to Europe. At the hearing on May 9, 2007, when Lee and his attorney did not appear, plaintiffs' counsel telephoned Kushner, who told him that he had substituted out. Kushner was surprised Lee had not appeared for trial. Plaintiff's counsel relayed this information to the trial court, which stated that it had not received a substitution of attorney. Kushner faxed a copy of the

substitution to the court; the substitution had been signed by Kushner and sent to defendant's new counsel, the Law Offices of Craig J. Silver.

Plaintiffs attached to their opposition a copy of Kushner's fax cover sheet sent to the Law Offices of Craig J. Silver on May 9, 2007. In it, Kushner advised Silver's office that on May 2, 2007, he had faxed back two signed substitution of attorney forms, and that he had copied his file onto disk and mailed it, along with a hard copy of the file, to Silver's office. Kushner noted that he had just received a phone call from the court, and that Kushner had not been able to file the substitution of attorney forms because Silver's office had not signed them. "I am not going to be held responsible for this debacle when it was Lee who made the idiotic decision to substitute my firm out of the case on the eve of trial simply because he didn't like the fact that I was duty bound to present the offer from the other side, and then discuss a costs benefits analysis with him."

Lee's reply accused Kushner of misconduct in faxing the unexecuted substitution of attorney form to the court. Lee's new counsel, without submitting a declaration to factually support counsel's contentions, argued that Kushner knew that the Silver firm had not yet been substituted in, and that Kushner remained defendant's counsel.

At the August 29, 2007 hearing, which was heard by a different judge, Lee's new counsel argued that they were unaware the trial was going forward. The Silver firm had contacted Kushner's office to let him know they were in the process of being retained, but that the firm had not been retained yet. The court noted that it did not have a declaration from Silver, and denied the motion.

The court found that defendant failed to meet his burden that the failure to appear was an accident or surprise, and that the evidence established Lee knew Kushner was not going to appear on May 9, 2007, and had already contacted Silver to represent him. Therefore, any "surprise" was the fact that the Silver firm failed to show up at the trial date. The court found that defendant failed to meet his burden that damages were excessive because the plaintiffs alleged they paid $97,000, and there is no indication the judgment included attorneys' fees.

B. Discussion.

1. Request for Continuance.

Defendant contends that the trial court abused its discretion in denying his request for a continuance because he was in Europe on the first day of trial; he did not learn of the trial date until May 9, 2007, when he was served with the Order to Show Cause; and he and the corporation were unable to proceed without representation. We disagree.

California Rules of Court, rule 3.1332 governs continuances of trial. Rule 3.1332(a) provides that "[t]o ensure the prompt disposition of civil cases, the dates assigned for a trial are firm." Pursuant to rule 1.1332(c), although continuances are "disfavored, each request for a continuance must be considered on its own merits. The court may grant a continuance only on an affirmative showing of good cause requiring the continuance." Circumstances that may indicate good cause include: [¶] . . . [¶] (4) The substitution of trial counsel, but only where there is an affirmative showing that the substitution is required in the interests of justice." The trial court may consider such other relevant factors as "(1) The proximity of the trial date; [¶] (2) Whether there was any previous continuance, extension of time, or delay of trial due to any party; [¶] (3) The length of the continuance requested; [¶] . . . [¶] (5) The prejudice that parties or witnesses will suffer as a result of the continuance; [¶] . . . [¶] (10) Whether the interests of justice are best served by a continuance, by the trial of the matter, or by imposing conditions on the continuance. . . " (California Rules of Court, rule 3.1332(d).) We review the trial court's denial of a continuance for abuse of discretion. (*Color-Vue, Inc. v. Abrams* (1996) 44 Cal.App.4th 1599, 1603.) "'[A] reviewing court should not disturb the exercise of a trial court's discretion unless it appears that there has been a miscarriage of justice. . . .' Discretion is abused whenever, in its exercise, the court exceeds the bounds of reason, all of the circumstances before it being considered." (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 566.)

Here, Lee substituted counsel for himself and the corporation between the status conference date of April 25, 2007, and the trial date of May 9, 2007. Previously, at the request of the parties, trial had been continued in October and November of 2006. On the second day of trial, Lee requested another continuance of 90 days. On the other hand,

plaintiffs appeared on the day of trial, presented five witnesses, and were prepared to rest their case. The prejudice to plaintiffs from Lee's request for a continuance based upon his eve-of-trial decision to change lawyers was severe, and Lee made no showing that such a substitution was necessary to further the interests of justice. The fact that the corporation was improperly unrepresented was due solely to Lee's eve-of-trial substitution. These circumstances demonstrate the trial court was within its discretion in denying defendants' continuance request. In any event, given Lee does not contest the alter-ego finding on appeal, and because under that doctrine, Lee is personally liable for the corporation's obligations,[3] he cannot show any prejudice from its lack of representation or appearance at trial.

2. No Evidence of Judicial Bias.

Lee further argues that there were irregularities in the proceedings due to the trial judge's prejudgment of the matter and partiality to plaintiffs. He points to the fact that the trial court did not want to ask plaintiffs to return to present their case again because they "did nothing wrong," and the court permitted plaintiffs to put on additional testimony concerning their alter-ego allegations. These contentions are without merit.

A court engages in misconduct if it makes persistent disparaging or discourteous comments about a party, lawyer or witnesses, conveying the impression they are not trustworthy or the case lacks merit. (*People v. Fudge* (1994) 7 Cal.4th 1075, 1107.) Judicial bias or prejudice consists of a mental attitude or disposition regarding a party. When reviewing a claim of bias, "'the litigants' necessarily partisan views should not provide the applicable frame of reference.'" (*Roitz v. Coldwell Banker Residential Brokerage Co.* (1998)

---

[3] The alter ego doctrine posits that in certain circumstances the court will disregard the corporate entity and will hold the individual shareholders liable for the actions of the corporation: "As the separate personality of the corporation is a statutory privilege, it must be used for legitimate business purposes and must not be perverted. When it is abused it will be disregarded and the corporation looked at as a collection or association of individuals, so that the corporation will be liable for acts of the stockholders or the stockholders liable for acts done in the name of the corporation.' [Citation.]" (*Mesler v. Bragg Management Co*. (1985) 39 Cal.3d 290, 300.)

62 Cal.App.4th 716, 724.) Bias and prejudice must be clearly established. "Neither strained relations between a judge and an attorney for a party nor '[e]xpressions of opinion uttered by a judge, in what he conceived to be a discharge of his official duties, are . . . evidence of bias or prejudice. [Citation.]'" (*Ibid*.) The appellant has the burden of establishing facts supporting a claim of judicial bias. (*Betz v. Pankow* (1993) 16 Cal.App.4th 919, 926.) We view the trial court's conduct under an objective standard to determine whether a reasonable person would entertain doubts about the court's impartiality. (*Hall v. Harker* (1999) 69 Cal.App.4th 836, 841, disapproved on another ground by *Casa Herrera, Inc. v. Beydoun* (2004) 32 Cal.4th 336, 349.)

Here, the trial judge's comments taken in context show that his statements that the plaintiffs had "done nothing wrong" related to the fact the plaintiffs had timely appeared for trial and were ready to present their witnesses; the trial court expressed this sentiment in relation to defendants' request for a continuance of trial after neither defendant appeared on the first date of trial. Further, defendant Lee was the only source of evidence to support plaintiffs' alter ego claims. Thus, the court's decision to permit plaintiffs to reopen their case was not the result of bias, but resulted from Lee's failure to appear the first day of trial.

III. THE TRIAL COURT'S AWARD OF DAMAGES WAS NOT EXCESSIVE.

Defendants contend the damages are excessive because they exceeded the amount of the prayer. This argument is without merit.

Code of Civil Procedure, section 580, subdivision (a) provides, "[t]he relief granted to the plaintiff, if there is no answer, cannot exceed that demanded in the complaint . . ; but in any other case, the court may grant the plaintiff any relief consistent with the case made by the complaint and embraced within the issue. . . ." This statute precludes the plaintiff from obtaining a default judgment in excess of the prayer for relief, but in a contested case, the rule is well settled that a plaintiff may obtain relief greater than that demanded in the complaint. (*Damele v. Mack Trucks, Inc*. (1990) 219 Cal.App.3d 29, 39-41.) However, in order to obtain greater relief, the plaintiff must amend the complaint to conform to proof, although a failure to do so, as a mere "technicality," would not be grounds for reversal. (*Castaic Clay Manufacturing Co. v. Dedes* (1987) 195 Cal.App.3d 444, 449-450.) Where, as

here, the matter is contested and a trial is held, relief greater than that requested in the complaint is not grounds for reversal.

Furthermore, the unrepresented corporation is not an impediment to the entry of judgment here even though it did not and could not appear at the second day of trial, because no default against the corporation was taken. In such case, the court may proceed on the uncontested matter and enter judgment. (See *Himmel v. City Council of Burlingame* (1959) 169 Cal.App.2d 97, 100 [corporation may not appear in propria persona].) Code of Civil Procedure, section 594, subdivision (a), permits the entry of judgment in uncontested matters.[4] (*Heidary v. Yadollahi* (2002) 99 Cal.App.4th 857, 863 [where defendant who has answered fails to appear for trial plaintiff may introduce whatever evidence is necessary to sustain plaintiff's case].)

---

[4] Pursuant to section 594, subdivision (a), "In superior courts either party may bring an issue to trial or to a hearing, and, in the absence of the adverse party, unless the court, for good cause, otherwise directs, may proceed with the case and take a dismissal of the action, or a verdict, or judgment, as the case may require; provided, however, if the issue to be tried is an issue of fact, proof shall first be made to the satisfaction of the court that the adverse party has had 15 days' notice of such trial or five days' notice of the trial in an unlawful detainer action as specified in subdivision (b)."

DISPOSITION

The judgment of the superior court is reversed with respect to the $30,000 award of emotional distress damages. In all respects, it is affirmed. Each party is to bear its own costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

ZELON, J.

We concur:

PERLUSS, P. J.

JACKSON, J.